

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 741 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

RAISING JITHRABHAI BHABHOR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 741 of 1992
MR DEEPAK M SHAH for Petitioner No. 1
MR MA BUKHARI, ASSISTANT PUBLIC PROSECUTOR
for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE D.P.BUCH

Date of decision: 05/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

#. The appellant accused has challenged in this appeal the impugned judgment and order of conviction and sentence dated 30.7.1992 passed in Sessions Case No.21/92 by the learned Additional Sessions Judge, Panchmahals at Godhra convicting him for the offence under section 302 IPC and ordered to suffer life imprisonment with a fine of Rs.500/-, in default, to undergo three months imprisonment.

#. As per the prosecution case, deceased Jithrabhai married twice. From his first wife, he had two sons, namely, Ramsinh and Raysinh (the present appellant accused). The first wife deserted him, therefore, he married to another woman "Madi". She had also died. Deceased had three sons and two daughters from his second wife Madi. There was already a partition of the properties in village Kamboi. Both the sons Ramsinh and Raysinh were given separate field wherein they constructed small house (Chhapra) and staying in it. Deceased Jithrabhai was staying in the house constructed in the third field.

2.1 The incident in question alleged to have taken place on 16.9.1991 between 1.00 p.m. to 6.00 p.m. at village Kamboi. It is alleged that the accused, who is the real son of deceased, killed his father deceased Jithrabhai by giving the axe blow on his body. It is further the case of the prosecution that, in the evening on 16.9.1991 the accused threw stones and arrows at the house of the witness - Ramsinh - son of deceased Jithrabhai and caused the damage of Rs.100/-, thereby, committed the offence under sections 436 and 323 IPC.

#. To prove its case, the prosecution examined the complainant - Khumsinh - son of deceased Jithrabhai and step brother of the accused - PW-2, Exh.18. The FIR Exh.19 was lodged on the next date i.e. on 17.9.1991 at about 11.30 a.m. at Valundi Police Station by the complainant - Khumsinh. Ramsinh Jithrabhai another son of deceased Jithrabhai and real brother of the accused was examined as PW-3, Exh.20. Then, nobody had actually witnessed the incident and the entire prosecution case is based upon the circumstantial evidence. The learned Additional Sessions Judge was of the opinion that, link of circumstantial evidences was completed in this case and it led to only conclusion that the accused was guilty and no one else. Therefore, he convicted the accused for the offence under section 302 IPC for committing the

murder of his father deceased Jithrabhai. However, by the impugned judgment, he came to the conclusion that the prosecution failed to prove its case against the accused for the offence under sections 323 and 436 IPC beyond reasonable doubt. Therefore, acquitted the accused for those offences.

#. The learned advocate, Shri Dipak Shah, appointed to defend the case of the appellant accused in this appeal, vehemently submitted that, in the instant case, the prosecution failed to prove the motive which was most important circumstance. Similarly, there was no reliable evidence on the point that the accused was seen last together with the deceased just before the incident. Discovery panchnama of weapon i.e. "axe" could not have been relied upon because discovery was made from the open field. He also submitted that, there was delay of more than 15 hours in lodging the FIR and the same remained unexplained. The conduct of the accused prior to the incident and after the incident was also not that which may lead to the conclusion that he was guilty. He submitted that, when the learned Judge himself acquitted the accused about the offence punishable under sections 436 and 323 IPC after the incident of murder, then he could not have convicted him for the offence under section 302 IPC because the conduct of the accused was not unnatural prior to the incident or after the main incident of murder.

#. However, learned APP Mr. Bukhari submitted that the prosecution has proved its case against the accused beyond the reasonable doubt and there was motive on the part of the accused to commit murder of his father who had second marriage after his mother left the house. The conduct of the accused prior and after the incident of murder was also unnatural. The very fact that the accused run away in the night supports the prosecution case. The way in which he misguided his young brother complainant - Khumsinh, was sufficient to come to the conclusion that the accused had committed the murder of his father. The discovery of weapon i.e. axe at the instance of the accused was sufficient to come to the conclusion that it was only the accused who had committed murder of his father, then, this court should not interfere with the order of conviction and sentence recorded by the learned Additional Sessions Judge in this appeal.

#. From the evidence of the prosecution witness, it is clear that the prosecution has miserably failed to prove the motive against the accused because almost 20 years

back the deceased Jithrabhai conducted one marriage after his first wife i.e. mother of the accused deserted him. It is difficult for us to accept the prosecution case that because of the second marriage being conducted by the deceased, the accused was hostile, and therefore, he committed murder of his father. We are conscious of the fact that in case of circumstantial evidence, motive is one of the important circumstance. We are also conscious that, it is always not necessary that, there should be a motive or motive should be established by the prosecution. If other circumstances are such that lead to only one conclusion that, it is the accused and the accused alone who committed the murder, then he can be convicted even if there is no motive or prosecution failed to prove the motive.

#. The most important circumstance is regarding the accused seen last together with the deceased just prior to the incident. That circumstances is not proved against the accused beyond reasonable doubt. The prosecution is relying on the sole oral testimony of Khumsinh - son of deceased Jithrabhai who is step brother of the accused. Mr.Khumsinh - PW-2, Exh.18 stated in his evidence that on the date of incident, it was about 12.00 noon. When he roasted cone and after having it, his deceased father sent him to cut grass in the field. When he was cutting grass, at that time, the accused came with an axe in his hands and told him to cut and get holies chicken. Thereafter, the accused went along with an axe at his house (Chhapra) and told him that, his father has gone to sleep, therefore, it is not necessary to disturb him and give tobacco. His father was sleeping on the cot. Thereafter, the accused took him for bringing their animals. The accused was walking ahead of him and thereafter he went to his house and he (complainant) went towards river with animals. He came back to his field at about 5.00 p.m. and saw his father having injuries on his cheek with an "axe" and also on his chest. There was bedsheet on his father when he went there and it was there when he left and came back. Both the times, bed-sheet was there. He went to Ramsinh - PW-3, Exh.20 and told him that his father has been killed. It was evening. All the people gathered there and on the next day morning, he went to Valundi police station and lodged the complaint at Exh.19. The accused run away in the night. In his cross examination he had stated that the accused is staying at the distance of only one field from his house. When he came back, Raysinh met him and helped him to put the grass on his head and came along with him at his house. When he wanted to give tobacco to his father, the accused Raysinh told him not to go to his

house and he went along with his animals. He has admitted in his cross examination that at about 9.00 p.m. on the day of incident, they had gone to Valundi police station and on the next day morning also, they had gone to Valundi and before the sun rise, police came there at his house. He has clearly stated in his cross examination that, he had never disclosed about the quarrel between the accused and his father. In his complaint before the police, he has admitted that, Ramsinh - real brother of the accused - Raysinh had no good relation.

#. In view of the above admission made by the complainant - Mr.Khumsinh, it is difficult to rely upon his evidence. If at all he has seen the dead-body of his father lying on the cot, then he would have at once realised that his father was dead. If they had gone to Valundi police station on the very night of the incident at about 9.00 p.m., then why nobody lodged the complaint about the incident and disclosed the name of the accused? It is also surprising to note that, before the complaint was lodged on the next day morning at about 11.00 a.m. at Valundi police station, police had already reached the place of incident before the sun rise. Under the circumstances, we are not prepared to place any reliance on the evidence of the complainant - Khumsinh regarding the accused being seen last together with the deceased just before the incident. If the deceased was given an axe blow on his chest and then face and there was bleeding injuries then at the first instant, the witness could have seen that his father was dead and he may not have gone to the field along with the accused. Even, another important circumstance, namely, the accused seen last together with the deceased just prior to the incident was not proved by the prosecution beyond reasonable doubt.

#. Similarly, conduct of the accused immediately prior to the incident and after the incident was not such which could lead to the conclusion that it was the accused and the accused alone who had committed murder of his father. Similarly, in the same manner, discovery of weapon i.e. axe at the instance of the accused is also doubtful because it is alleged that an axe was discovered from the field.

##. Thus, in our considered opinion, the prosecution

miserably failed to prove its case against the accused beyond reasonable doubt and the chain of circumstances is not complete in this case. Therefore, we are of the considered opinion that the learned Additional Sessions Judge erred in coming to the conclusion that the prosecution proved its case against the accused beyond reasonable doubt by completing the chain of circumstances.

##. In view of the above discussion, this appeal stands allowed and the impugned judgment and order of conviction and sentence dated 30/7/1992 passed by the learned Additional Sessions Judge, Panchmahals at Godhra passed in Sessions Case No.21/92 convicting the accused for the offence under section 302 IPC and sentencing him the life imprisonment and to pay a fine of Rs.500/-, in default, to undergo three months imprisonment is hereby quashed and set aside. The appellant accused is ordered to be set at liberty forthwith if not required in any other case.

(B.J.Shethna, J)

(D.P.Buch, J)
(pathan)